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In the Supreme Court of the United States

OCTOBER TERM, 1983

OUIMET CORPORATION, OUIMET STAY & LEATHER COMPANY, OUIMET WELTING COMPANY and EMIL R. OUIMET WAREHAM TRUST,

PETITIONERS,

v.

PENSION BENEFIT GUARANTY CORPORATION, AVON SOLE COMPANY, TENN-ERO CORPORATION and HERBERT KAHN, TRUSTEE,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Respondent Herbert C. Kahn, bankruptcy trustee of the estates of Avon Sole Company and Tenn-Ero Corporation, hereby opposes the petition for a writ of certiorari filed by Ouimet Corporation *et al.* in this case.

Summary of Argument

The constitutional challenge to the retroactive application of the termination liability provisions of the Employee Retirement Income Security Act of 1974 that has been asserted by the petitioners is just a slightly restated and limited version of the same argument made by petitioners in an earlier appeal.

The argument was rejected by the Court of Appeals for the First Circuit, which followed an earlier decision of the Court of Appeals for the Seventh Circuit, and this Court denied certiorari. Petitioners have presented no new reasons why their retroactivity argument should be considered by this Court at this time.

Petitioners' assertion that the First Circuit decision in this matter is inconsistent with an earlier decision of the same court does not provide a reason for granting certiorari, both because the two decisions are in fact consistent and also because, even if they were not, the proper forum for resolution of the conflict would be the First Circuit Court of Appeals itself.

Respondent Herbert C. Kahn joins in the position of the Pension Benefit Guaranty Corporation in seeking denial of certiorari upon the other issues raised by the petitioners.

Argument

I. The Holding of the Court of Appeals Concerning Retroactivity Is Not of Sufficient Importance To Require Review by This Court.

This Court has already considered and upheld the retroactive application of the termination liability provisions of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 832, *codified at* 29 U.S.C. § 1001 *et seq.* (hereinafter "ERISA"), on statutory grounds. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980), *affirming* 592 F.2d 947 (7th Cir. 1979). This Court declined to review the issue on constitutional grounds (446 U.S. at 368), even though the constitutional argument had been made and determined by the Court of Appeals. 592 F.2d at 958-63. The constitutional and statutory arguments concerning retroactivity were made and rejected in an earlier appeal by the petitioners, and this Court declined to grant certiorari.

Pension Benefit Guaranty Corp. v. *Ouimet Corp.*, 630 F.2d 4, 12-13 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) (hereinafter referred to as "*Ouimet I*").

The decision that petitioners are now asking this Court to review, *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983) (hereinafter referred to as "*Ouimet II*"), presents a less important version of the same question. Whereas *Ouimet I* concerned the retroactive assessment of any pension underfunding liability (630 F.2d at 12), the petitioners in *Ouimet II* question only whether they, as members of a controlled group that acquired new members before ERISA took effect, can constitutionally be held liable for underfunding of the new members' pension plan *to the extent that such underfunding already existed on the acquisition date.* (Petition at 5-6.) Certainly if ERISA had been in effect at the time the petitioners added new members to their controlled group, they could raise no constitutional challenge to sharing the new members' pre-existing contingent liability for underfunding. Only the fact that ERISA was not in effect at the time of the acquisition creates even a colorable constitutional issue. The Court of Appeals determined in *Ouimet I* that there was no violation of the Constitution (630 F.2d at 12) and this decision is now the law of this case.

The petitioners have not presented any new reason for this Court to consider the retroactivity of ERISA. Rather, the petitioners rely primarily upon *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), and its progeny, which the Court of Appeals deemed inapposite in *Ouimet I* (630 F.2d at 12) in a decision that this Court declined to review. 450 U.S. at 914. Petitioners' reliance on the *Alton Railroad* line of cases is simply misplaced where, as here, Congress made detailed findings concerning the urgent need for the termination liability provisions of ERISA, adopted a rational and limited means to a legitimate end, and did no more than provide a mechanism to enforce an already existing contractual liability. *See Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, *supra*, 592 F.2d at 958-63.

II. There Is No Inconsistency Among the Courts of Appeals Concerning Allocation of Liability Among Members of a Controlled Group, Nor Is This Issue Ripe for Review.

Petitioners' assertion of inconsistency between the earlier and later decisions of the Court of Appeals for the First Circuit does not present a persuasive ground for intervention by this Court. Petitioners do not allege a conflict between different Courts of Appeals. *Cf.* Sup. Ct. R. 17(1)(a). Even if a conflict between panels of the same Court of Appeals existed here, the appropriate forum for resolving the inconsistency would be the Court of Appeals, not this Court. *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

More fundamentally, there is no conflict between panels of the First Circuit. Examination of the decisions in *Ouimet I* and *Ouimet II* reveals, first of all, that Judge Bownes wrote both of them. As would be expected under these circumstances, the two decisions reflect a consistent interpretation of ERISA's statutory scheme.

Under ERISA Section 4062, 29 U.S.C. § 1362, an employer is liable to the Pension Benefit Guaranty Corporation ("PBGC"), upon termination of a pension plan, for the lesser of the amount by which the plan is underfunded or 30% of the employer's net worth. *Ouimet I* held that members of a group under common control are to be treated as one employer for purposes of termination liability. *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 470 F. Supp. 945, 954 (D. Mass. 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). After stating this conclusion, the District Court added: "Thus, the PBGC may impose termination liability, jointly and severally, on each member of a controlled group, whether or not such member contributed to the terminated pension plan." *Id.* The Court of Appeals referred to this holding and then stated: "We affirm, but on somewhat different grounds." 630 F.2d at 8. Other than this single offhand reference to joint

and several liability, the Court of Appeals in *Ouimet I* did not discuss the allocation of liability among members of the controlled group.

In *Ouimet II*, the issue of allocation was squarely presented. The District Court affirmed the Bankruptcy Court's determination that liability should be allocated among members of a controlled group in proportion to the members' net worth, except that in the case of bankrupt members having no net worth, the value of their assets should be considered their net worth. *Pension Benefit Guaranty Corp.* v. *Ouimet Corp.*, 711 F.2d 1085, 1088 (1st Cit. 1983).[1] The Court of Appeals agreed that liability should be allocated in proportion to net worth, but held that substituting asset value for net worth in the case of bankrupt companies "reads more into the statute than we are willing to accept." *Id.* at 1092. The court did not authorize the PBGC to collect from any member in excess of its pro rata share (*i.e.*, 30% of its net worth) and explicitly rejected the petitioners' attempt to do so under theories of contribution and indemnification. *Id.* at 1090-91. These holdings are completely consistent with the court's position on the issues that were actually discussed and determined in the *Ouimet I* decision.

Finally, the petitioners have erred in mistaking limitation for inconsistency. It is not *inconsistent* to say that while liability of members of a controlled group is joint and several, it is *limited* to 30% of the net worth of each. Indeed, this is the only rational construction of a statute that explicitly limits liability to 30% of net worth but does not explicitly provide for joint and several liability. ERISA § 4062(b)(2), 29 U.S.C. § 1362(b)(2). The net worth limitation does not eliminate the advantages to PBGC of joint and several liability; in a case where the termination liability were less than 30% of the net worth of each member of a controlled group, the principle of joint and several liability would allow PBGC to attempt col-

[1] The decision of the District Court is not reported.

lection of the full amount from any member of the controlled group. Perhaps this question will be presented in a future case, in which solvent members of a controlled group are disputing allocation of termination liability among themselves. In the instant case, the only actual dispute was between all solvent members of the controlled group on the one hand, and all insolvent members on the other hand. Hence the actual holding of the Court of Appeals in *Ouimet II* was a narrow one: no member of a controlled group that is insolvent, and thus has no net worth, can be liable to PBGC or to other members of the controlled group for any amount. This holding is both correct and consistent with the earlier decision.

Along with the alleged inconsistency between the Court of Appeals decisions in *Ouimet I* and *Ouimet II*, petitioners have asserted that *Ouimet II* is inconsistent with ERISA because the statute provides for claims of the PBGC to be asserted and have priority in bankruptcy proceedings. ERISA § 4068, 29 U.S.C. § 1368; Petition at 15. Evidently the petitioners mean to argue that since Congress provided for PBGC to assert claims in bankruptcy cases, Congress must have intended PBGC to have a claim against a company having no net worth at the time of termination of its pension plan. But this does not follow at all. The utility of Section 1368 arises when a company having some net worth at the time it terminates a pension plan later becomes bankrupt without having paid PBGC. Thus, there is no inconsistency between ERISA and *Ouimet II*.

The petitioners' assertion that the Court of Appeals in *Ouimet II* imposed "an additional step to the imposition of termination liability" (Petition at 16) does not present a substantial issue for determination by this Court. It is clear on the face of the statute, and petitioners do not deny, that Congress after careful consideration chose to limit an employer's liability to 30% of its net worth. The Court of Appeals construed the statute to mean that, where the "employer" comprises more than one company, no company may be liable for more than

30% of its own net worth. Far from imposing "an extra step" not intended by Congress, the court adopted the only possible construction that would not disregard the legislative intent to limit termination liability to 30% of the terminating employer's net worth.

Similarly, the petitioners' accusation that the Court of Appeals was not fair in its allocation in this case (*id.* at 18-20) does not present an issue of broad applicability and is, in any event, adequately answered by the Court of Appeals. The Court noted that the allocation "is really one between the solvent members of the Ouimet Group and the creditors of the bankrupt companies" (711 F.2d at 1091) and it hardly seems unfair that responsibility should be placed upon the solvent companies that, as members of a controlled group, shared in the benefits of the bankrupt companies' pension plan.

Finally, even if the question of how termination liability should be allocated among members of a controlled group might someday acquire sufficient importance to require determination by this Court, the issue is not ripe at this time. Petitioners have not cited a single decision other than *Ouimet II* that addresses this issue. If the issue should ever arise again, it may well do so in a very different factual context, for example, in a dispute over allocation between a *solvent* company terminating its own underfunded pension plan and other members of a controlled group. The issue will probably never require resolution by this Court. It certainly does not require resolution now.

III. The Remaining Issues Raised by the Petitioners Do Not Affect the Respondent Bankruptcy Trustee.

In addition to the issues discussed earlier in this brief, the petitioners have sought certiorari on the question whether interest on PBGC's claim is subject to the same 30%-of-net-worth limitation as the claim itself and whether the Court of Appeals misconstrued this Court's decision in *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982). The determination of

these issues will not, by itself, affect the bankruptcy estates of Avon Sole Company and Tenn-Ero Corporation. However, your respondent bankruptcy trustee of these estates joins in the assertion of the PBGC that these issues do not merit review by this Court.

IV. Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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